

September 13, 2013

COMMENTS ON THE PRELIMINARY DRAFT OF CHANGES TO PART 83
PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP
EXISTS AS AN INDIAN TRIBE.

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I have had the opportunity to review the proposed changes to "Part 83 Procedures For Establishing That An American Indian Group Exists As An American Indian Tribe." In general, I find them to be a great improvement over the existing regulations. While there is much to consider with these proposed changes, I will limit my comments to the definitions, general provisions and criteria (a), (b), (c) and (e).

Since 1979 I have worked with more than two dozen Indian groups on their petitions for federal acknowledgment, and in that time I have witnessed an exponential increase in the amount of time and expense, and in the volume of narrative and documentation required to prepare a petition and respond to a proposed finding (whether favorable or not). It is clear from the detail provided by the Office of Federal Acknowledgment (OFA) that its staff expends at least as much time, if not more, preparing its reports and findings. It is questionable whether all the minutiae going back, in some cases, three centuries is worth the time, effort and money the petitioners and the OFA staff expend.

The regulations are an attempt to apply a set of standards to federal recognition, which up to the promulgation of the regulations had been mostly serendipitous. But in the efforts to apply objective measures, the present regulations did not take into account in any meaningful way the availability of records required to satisfy the criteria, particularly for the nineteenth and first decades of the twentieth centuries. The change in the regulations shortening the time period will make for a more equitable process and greatly lower the costs for the petitioner and the federal government. The Department has already made a change in the definition of "first sustained contact" when in 2008 it set March 4, 1789 as a beginning date. Unfortunately, federal and state record keeping - the very documents that petitioners' depend on to satisfy the criteria - were rarely maintained throughout most of our history. For community and ancestry, a more realistic time frame

is required, one when there is some expectation of the existence of documentation.

Nineteen thirty four would satisfy this deficiency in the regulations.

Specific Comments

83.1 Definitions

Continuously or continuous: Shifting from “first sustained contact” to “1934” is a reasonable adjustment given the nation’s and in most cases individual states’ treatment of native peoples. This is especially true for tribes along the eastern seaboard. Using 1934 covers nearly a hundred years of social and political interaction.

Historically, historical or history: This definition appears to be in conflict with “Continuously or continuous” in that it preserves the ‘first sustained contact’ requirement. This will lead to no end of controversy and should be changed to “1934.”

83.6 General provisions for the documented petition

(a) limits the length of a documented petition. This is a case where the devil is in the details. How many pages is enough is dependent on how pedantic the OFA is in reviewing a petition. Put another way, the problem is that limiting the number of pages in a documented petition does not restrict the expectations of those who will be evaluating the petition. The first successful petition was a hundred or so pages without exhibits. The most recent successful petition exceeds 1,000 pages of text, five linear feet of documents and 42 banker boxes of genealogies, a sizeable portion of which was added as a result of the OFA’s questioning and after the receipt of a favorable proposed finding. If page limitations are incorporated with these proposed changes (a change I favor), then there must be an opportunity to supplement the record based for at least inquiries from the OFA staff. There also should be a limitation on the length of the proposed and final findings by the OFA.

Criteria

(a) The deletion of criterion (a) makes sense. The evidence presented in criterion (a) generally appears in criteria (b) and (c). Criterion (a) added nothing to the process.

(b) The proposed changes call for an as yet unspecified percent to show that “the petitioning group comprises a distinct community and has existed as a community from 1934 until the present without interruption,” The evidence required to meet the as yet unspecified percent is qualitative, relying on the interpretation of phrases like “significant

rates,” “significant social relationships,” “significant degree” and “significant portion.”

How does one quantify such qualitative evidence? How is the word significant to be defined for the purposes of this criterion? Would the same definition be used when speaking of rates, social relationships, degree and portion?

Criterion (b)(2) provides five types of evidence to demonstrate community, two of which can be readily quantified: ((i) residency and (ii) in-marriage). Quantifying “distinct cultural patterns”(iii) is far more problematic, and as to (iv) “distinct community social institutions encompassing most of the members” (emphasis added), this one suffers from the same problem as the evidence in (b)(1): how do you define “most,” and what percent does it represent? Going back to in-marriage: why are in-marriages and patterned out-marriages acceptable evidence under (b)(1)(i), but not under (b)(2)(ii)? For (2)(i) and (ii) I recommend staying with the present 50 percent. I am not certain that (2)(iii) can be quantified, so I would drop the percent or make more explicit what the Department seeks to have quantified.

It is important to point out that Indian communities are unlike most other communities in the United States. Most communities are geopolitical entities whose boundaries are physical and whose membership is defined by residency. For Indian communities, membership is by ascription and individuals are members even if they reside outside a specific geographic location.. Residency, therefore, is less important than ancestry. The importance of ascription as the basis for membership and as proof of community is clearly embodied in the present regulation. It is one of the absolute proofs of community and political existence (83.7 (b)(2)(ii) and (v). Thus, an Indian community in 1934 has time depth that may exist in a non-Indian community but is not the defining factor of non-Indian communities. Indian communities are not Levittowns, springing up at the whim and plans of a developer. If an Indian community existed in 1934 it can certainly be presumed to have existed in the past, lacking evidence to the contrary.

(c) There are three proposed changes to this criterion: the addition of a lengthy exegesis on the meaning of political influence or authority, the addition of a type of evidence (2)(v) (continuous line of group leaders and a selection process) and (4) a statement that inherent limitations on demonstrating political influence or authority “shall be taken into account.” Thus, the criterion remains essentially unchanged.

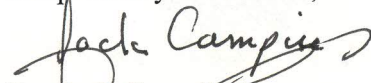
(e) There are two proposed changes to criterion (e). The first sets a threshold percent of "individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." Presently, the OFA uses 80 percent as the minimum acceptable percentage to meet this criterion, and that seems a reasonable percent to me.

The more pressing question has to do with how far back in time a petitioner has to go to demonstrate the connection to an historical tribe(s). In the present regulations historical is defined as "dating from the first sustained contact with non-Indians," which means, based on the 2008 change, from 1789. The OFA has accepted the U.S. Special Indian censuses of 1900 and 1910 as base lines to demonstrate historical tribal continuity.

However, the OFA has in addition required some petitioners to trace back to early censuses, going back to the early 1800s. This has resulted in an inordinate and useless amount of work for both petitioners and the OFA. And more to the point, this requirement is an intolerable burden for some petitioners, particularly those along the eastern seaboard and those who were located in states with strong records of segregation. In many states tribal people were classified as non-white, and therefore their tribal identities were never acknowledged, much less recorded. To continue this requirement of tracing back nearly two hundred years is to penalize those today for the past racism practiced against their ancestors. I recommend that petitioners be required to demonstrate descent a historical tribe or tribes, using the present and proposed types of evidence, from at least 1900.

As to use of evidence provided from historians and anthropologists, I heartily endorse this addition. If we are to accept the word of a census taker, which the OFA presently does, it is reasonable to rely on the research of trained social scientists and historians.

Respectfully Submitted,


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